

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES, et al., : Civil Action No.:
Plaintiffs, : 1:23-cv-108
versus :
GOOGLE LLC, : Friday, June 2, 2023
Defendant. : Alexandria, Virginia
: Pages 1-37

The above-entitled motions hearing was heard before the Honorable John F. Anderson, United States Magistrate Judge. This proceeding commenced at 11:02 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

PROCEEDINGS

2 THE DEPUTY CLERK: United States of America, et
3 al. versus Google LLC, Civil Action Number 23-cv-108.

4 MS. STARR: Good morning, Judge Anderson.

5 Kristin Starr from the U.S. Attorney's Office. And with me
6 are my colleagues from the Department of Justice, Kelly
7 Garcia and Julia Tarver Wood.

I'll let the counsel from the State AG's Office introduce themselves.

10 THE COURT: Who's going to be arguing for the
11 United States?

12 MS. STARR: Kelly Garcia will be arguing for the
13 United States, Your Honor.

14 THE COURT: Thank you.

15 MS. GARCIA: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MS. TARVER WOOD: Good morning, Your Honor.

18 MR. HENRY: Good morning, Your Honor. Ty H

19 from the Virginia Attorney General's Office on behalf of the
20 plaintiff states.

21 THE COURT: Thank you.

22 MR. EWALT: Good morning, Your Honor.

23 Andrew Ewalt from Freshfields on behalf of Google. I'm
24 joined by Joseph Bial from Paul, Weiss, who will be arguing
25 this morning; as well as Sara Salem from Freshfields;

1 Amy Mauser from Paul, Weiss; and, of course, Craig Reilly.

2 THE COURT: Okay. Thank you. All right.

3 Well, I got a motion that has two parts in front
4 of it. I want to deal with the custodian issue first and
5 deal with that completely, and then we'll get to the other
6 issue after that.

7 So let's go ahead -- and I've read what everybody
8 submitted. You know, it -- I appreciate your trying to keep
9 the briefs brief, but there's -- and this goes to both of
10 the issues, but it relates a little less so to the custodian
11 issue.

12 A significant amount of substantive information
13 really hasn't been provided to me. You talk about we
14 identified 63 custodians. There's no information
15 relating -- at least provided to me, I assume you all know
16 it -- as to, you know, who these custodians really were,
17 what they really did, what their role really was based on
18 the information that you provided. And, you know, they
19 provided some information as to those 63, and you've gotten
20 some information, you haven't gotten some information.
21 They've agreed to produce custodians or follow-on custodians
22 for some but not the others.

23 But I don't have any real substance behind the
24 numbers, and that's a little concerning. And I know your
25 argument is, you know, they had information back in -- or

1 the person who was in this position back in 2020, it was
2 agreed that they had substantive information and their
3 material issue had been reviewed and looked at. And I -- I
4 take it from your argument it is -- I am to assume that that
5 position, or whatever the person did in that position in
6 2020, has an ongoing relationship, need or involvement in
7 the issues in this case. But, I mean, that's an assumption;
8 not something that has really been shown to me at this
9 point.

10 You know, clearly, Google has acknowledged that in
11 some respects, and that some of the successor custodians
12 they've agreed to either are already on the list and are
13 currently doing jobs, functions, responsibilities that
14 are -- they acknowledge are -- but I'm at a little bit of a
15 loss as to how is it that I just assume a custodian in 2020,
16 a new person in that job duties and responsibilities is
17 going to have information between October of 2020 and now.

18 MS. GARCIA: Your Honor, good morning.

19 Kelly Garcia for the United States.

20 So today we're coming before you on only one
21 remaining issue. With respect to the issue of successor
22 custodians, this morning we received an email from Google's
23 counsel in which they agreed to identify the remaining
24 successor custodians in order to cover the post-October 2020
25 time period and add those custodians to their list. As we

1 responded this morning, we consider this issue resolved.

2 THE COURT: Okay. Well then, that whole
3 discussion was for nothing. I guess I should have asked if
4 there any updates on that issue before I came in.

5 Well, that's -- so they're going to provide you
6 the information on the 18 of the 63 that you didn't have.
7 The 11 that they said, you know, we have successors for,
8 they're going to be looking at their documents and providing
9 information from October of 2020 to the present; is that
10 your understanding?

11 MS. GARCIA: Exactly, Your Honor.

12 THE COURT: Is that consistent with what -- I had
13 a hearing at 10. I didn't see any filings or anything to
14 indicate that that got worked out.

15 But is that the agreement for --

16 MR. BIAL: Your Honor, yes. Joseph Bial for
17 Google. That is the agreement.

18 THE COURT: Okay. Well, thank you very much.

19 Let's move to the next issue, which is, honestly,
20 even more confusing to me. And my concerns with what I have
21 in front of me today, you know, you've got the document
22 requests, you've got an -- well, first of all, have you
23 worked it out, I guess should be my first question, and if
24 not, then I'll continue to have some discussions.

25 MS. GARCIA: I appreciate that, Your Honor. We're

1 still at an impasse, so this is still an issue that we would
2 like resolution on today.

3 THE COURT: Okay. Well, whether you're able to
4 get a decision from me today will be -- we'll find out.

5 But the thing that I am -- again, I'm not sure I
6 fully understand based on the briefing. And, again, I
7 recognize you've got a lot of people who are dedicating
8 their full time and attention to this case and know a lot
9 more about this case than I do.

10 The issue -- overarching issue is they have agreed
11 to provide you with 9 of the 12 source code requests. The
12 three, the last three, they've said, you know, either we
13 understand, we don't think it's relevant, we don't really --
14 you know, too hard to figure out what it is.

15 I don't understand when they say they're going to
16 be producing all the source code as to a particular project,
17 tool, whatever, what it is that's in the remaining amounts
18 that is not included in the first amount here.

19 So, help me understand what it is in those three
20 areas that seem to be at issue. And I know there are more
21 than just that, but I think that's a key issue that we need
22 to address.

23 So -- and, again, you know, the first nine are
24 pretty specific. "This project," they know what that
25 project is, they can go look. The others are a little

1 bit -- you know, source code that relates to -- pretty
2 amorphous. You know, how you do X, Y, Z, as opposed to a
3 particular project, proposal, whatever.

4 So let me hear about that; okay?

5 MS. GARCIA: Yes, Your Honor.

6 As counsel acknowledged on a meet-and-confer
7 yesterday, the way in which we described the last three
8 categories of our RFP may not be how Google's own engineers
9 describe it. What we've tried is -- tried to do is
10 describe, with good-faith efforts, other information that we
11 believe would be relevant, although we have no code name or
12 specific other identifier in order to be able to give more
13 information at this time.

14 THE COURT: Well, you know, this Project Bernanke
15 or Poirot or the dynamic revenue share or the predictive
16 highest bidder, the Smart Bidding, do they encompass what
17 you're asking for in any other requests or not?

18 MS. GARCIA: Your Honor, they may. And if I --
19 with this opportunity, I would like to be able to describe
20 those three remaining requests in plain language.

21 So with respect to -- with respect to RFP 39
22 Part 10, we've given a functional description here asking
23 for the source code or algorithms that choose what
24 exchanges, DSPs and Ad Networks are called on by each of the
25 Google products at issue in this case, Google Ad Manager,

1 DV360 and Google Ads.

2 To the extent those are covered by any of the code
3 names that we've identified, we appreciate Google's efforts
4 to search for and identify responsive information, but our
5 concern is that if we don't already know a certain name of a
6 project, particularly a newer project that perhaps postdates
7 several documents and depositions that happened during the
8 investigation, we don't want to suggest that those -- that
9 source code or those algorithms are not relevant here.

10 THE COURT: So, I mean, the document request that
11 you have served -- and that's what's in front of me, to some
12 extent -- and looking at 10: "Any curation function for the
13 related products that determine which exchanges, DSPs and Ad
14 Networks to call."

15 MS. GARCIA: Yes, Your Honor.

16 THE COURT: So go back and tell me again what that
17 really means.

18 MS. GARCIA: So by "curation function," we're
19 simply referring to the function of the algorithm that
20 chooses which exchanges, DSPs or Ad Networks are called by
21 the program. We're limiting our request to algorithms and
22 source code that are specific to Google Ad Manager, DV360
23 and Google Ads.

24 THE COURT: Okay. All right. What about 11?
25 "Any bid, price floor or auction optimization algorithm" --

1 any -- "product or feature."

2 MS. GARCIA: Yes, Your Honor.

3 With respect to Subsection 11, we believe we've --
4 we're asking for source code for any Google bid, price floor
5 or auction optimization algorithm, product or feature, and
6 we've provided counsel and in the papers some references to
7 complaint paragraphs in an attempt to give as much
8 information as we possibly could.

9 THE COURT: Why don't you think that's already
10 included in the, you know, other project information and
11 other things that you've asked for in 1 through 9?

12 MS. GARCIA: Your Honor, it may very well be
13 included in those responses, but given the information that
14 we have to date and the information that we have from
15 Google, we cannot say for sure that it is.

16 THE COURT: All right. And 12.

17 MS. GARCIA: Twelve asks for source code
18 pertaining to any automated means or manner of bidding,
19 whether on individual bids or a campaign-level basis.

20 Again, the complaint discusses these issues, and,
21 unfortunately, we don't have specific code names or other
22 identifiers that we can provide to Google based on the
23 information that we've been able to gather up to this point;
24 however, we believe that this is sufficient information for
25 Google to be able to take back to its client. You know, the

1 teams of engineers that work at Google, we suspect that they
2 have more information on what exactly these automated means
3 are called, and, unfortunately, we cannot provide any more
4 information other than what we have.

5 THE COURT: Okay. Well, what efforts have you
6 taken, other than good-faith consultation with counsel, to
7 figure out what it is? I mean, have you taken a 30(b)(6) on
8 a very narrow area as to, you know, what is it that we need
9 to do to, you know, figure out about, you know, curation
10 function for products that determine the exchanges? Or the
11 bid floor price auction optimization algorithm, product or
12 feature? Or try and figure out something specific?

13 I mean, the problem is, if you're asking me to
14 order them to do something that is vague -- well, if it's
15 something they're already going to be providing, that's not
16 a problem, and I'll hear whether it really is, these three
17 things are subsumed in 1 through 9 or not. And I understand
18 your concerns. If a -- you know, if a directed reading of
19 some of these projects or programs or code names is limited,
20 if they limit it to that particular thing, and it also does
21 or relates to other things that you want to get some other
22 information that relates to that, but 1 through 9 seem very
23 specific; 10, 11 and 12 seem pretty broad, maybe vague,
24 sometimes catch-all. Those are all terms that come to mind
25 when you read those three compared to the first nine. And I

1 don't want to be in a position of ordering somebody to do
2 something that isn't specific.

3 So what have you done in order to get specific
4 information from Google other than through lawyers and
5 communications with counsel?

6 MS. GARCIA: Your Honor, during the course of our
7 investigation, we took several depositions, as you know. We
8 posed these questions to individuals who we understood were
9 involved in the creation of this code, and those individuals
10 were not able to give us a complete understanding of the
11 code itself. A lot of the testimony that we received
12 suggested that there are several engineers across Google who
13 work on issues like this. For that reason, we have not
14 pursued a 30(b)(6) at this time.

15 This case is -- at its core, it's about
16 programmatic digital advertising tools, which is its code.
17 We've done our best to identify code names, and we have in 1
18 through 9, but, otherwise, we've done our best to articulate
19 what we are looking for.

20 What we told Google yesterday on a meet-and-confer
21 was that if Google's engineering teams have made good-faith
22 efforts to find responsive source code and cannot find it,
23 we would accept an affidavit from a Google employee with
24 knowledge explaining that they've taken steps to identify
25 this information and that it doesn't exist.

1 We've also made clear that, in addition to the
2 affidavit, we would ask that Google stipulate that neither
3 party would rely on source code if it comes to light later
4 on that this information does, in fact, exist.

5 THE COURT: Okay. There's a fair amount of
6 discussion in your papers about your experts, him or her,
7 needing additional information and needing roadmaps and
8 guidelines and those kinds of things. I don't have anything
9 from an expert; I only have you saying your experts may need
10 this kind of information.

11 What's the basis for your statement, and why is it
12 that you think what they have agreed to provide -- and they
13 have, you know, outlined in their opposition some
14 information they've agreed to search for and provide
15 relating to source code that they've agreed to provide, and
16 why is any more necessary?

17 MS. GARCIA: Your Honor, the basis for this
18 request was from -- it was a request from our expert teams
19 and their consultation teams.

20 How they explained it to us -- I'm not someone who
21 has a degree in computer science, so I can't pretend to have
22 firsthand knowledge of this. But the way that they
23 explained it to us was that they expect, having done this
24 type of work before, that there exists data dictionaries,
25 user manuals and other explanatory materials in the ordinary

1 course of business at Google. They told us that since
2 Google is a large organization and no one person is likely
3 to have a full understanding of all of the relevant code
4 across the company, they expect manuals exist to explain
5 these materials to someone within the organization who works
6 in a different department or someone who is new to the
7 organization, for example, a new hire.

8 THE COURT: Well, why do they need that
9 information? I understand they say they may have that
10 information, they're a big company, and they may have
11 guidelines and things, but why is it that your experienced
12 team of experts would need, you know, a roadmap from Google
13 to look at the information that they --

14 MS. GARCIA: Your Honor --

15 THE COURT: -- have gotten or will be getting?

16 MS. GARCIA: Thank you, Your Honor.

17 From what we have agreed to with plaintiffs in
18 order to protect source code and respect the confidentiality
19 of the source code, our experts will be subject to
20 significantly restrictive provisions when they do access the
21 source code. They can only go in from a certain point in
22 the morning to a certain point in the night. They can only
23 go in and be observed by someone else. They can take notes,
24 but they can't write down any portion of the source code.
25 All of these strict conditions are agreed to already by the

1 parties in the protective order.

2 THE COURT: And they're usual. I mean, there's
3 nothing really unusual about that when you're dealing with
4 source codes.

5 MS. GARCIA: So, Your Honor, what we're attempting
6 to do is arm our experts with the information that they've
7 told us they would need in order to understand, as
8 outsiders, not as Google engineers, the information that
9 they're reviewing when they go in to look at the source
10 code.

11 They are also doing this rather quickly. And part
12 of the reason why we've asked for Your Honor's intervention
13 at this stage is that we've -- you know, to date, we haven't
14 had a discussion about concrete timing, when our experts
15 will have access to this source code, when everything will
16 be up and ready. The proposal that we've seen was a bit
17 ambiguous with respect to whether Google has identified any
18 of the source code to this date.

19 Yesterday on the meet-and-confer, I put the
20 question to Google and was told that they cannot confirm
21 that they've identified any of the responsive source code.

22 THE COURT: Not even for the nine items that
23 they've agreed?

24 MS. GARCIA: That's my understanding, Your Honor.

25 THE COURT: Okay. Well -- all right.

1 Well, what else would you like to say before I
2 hear from Google's counsel?

3 MS. GARCIA: Your Honor, I'd like the opportunity
4 to address any other specific questions you have with
5 respect to, you know, our efforts to reach agreement up to
6 this point, any questions you have with respect to why we
7 believe the source code is so crucial to our case, or any
8 other questions you have in general.

9 THE COURT: Well, I mean, I need to hear from
10 Google's counsel about what is not in 1 through 9 that may
11 be covered by the -- if you give a fair reading to 10, 11
12 and 12 and not a broad interpretation of that. I think
13 you've tried to explain to them what it really is that
14 you're looking for and want to have, and I think, you know,
15 are entitled to get that kind of information.

16 MS. GARCIA: Thank you, Your Honor.

17 THE COURT: So let me hear from counsel. Thank
18 you.

19 MS. GARCIA: Thank you.

20 THE COURT: First, I want to hear about the --
21 there are nine areas in which you have agreed to provide
22 source code from.

23 MR. BIAL: That's correct, Your Honor.

24 THE COURT: And where are you in the process of
25 getting that so that can start being looked at?

1 MR. BIAL: Sure. So let me just take a step back.

2 The way that we identify that, and you mentioned
3 those seem to be less vague, and that's Request for
4 Production Number 39 that includes the 12 categories.

5 THE COURT: Right.

6 MR. BIAL: So we work with the folks at the
7 company to, you know, find out what does that mean, and, in
8 those instances, as you mentioned, those are projects and so
9 forth. So we're able to identify those. And then it's
10 still -- obviously it's the company's secret sauce, if you
11 will, but we've got the protocol here for source code. So I
12 think it's just going through the mechanics of that in order
13 to produce 1 through 9.

14 THE COURT: Okay. I understand that.

15 Where are we in the mechanics of doing that --

16 MR. BIAL: Oh, it's --

17 THE COURT: -- so that we can actually, you know,
18 start doing something -- that is, the plaintiffs can start
19 seeing that information and making a determination as to
20 whether, you know, the information that you're providing is
21 going to be sufficient or not?

22 MR. BIAL: Correct. No, Your Honor. That's a
23 fair question.

24 So that's actually -- right now we're in the
25 process of getting that prepared for production, but we're

1 still going to have to figure out who is going to receive
2 it, and that might take, you know, a bit of time because
3 we've got to go through paragraphs 2 and 3 of the --

4 THE COURT: "Prepared for production," let's focus
5 on that issue now.

6 MR. BIAL: Right.

7 THE COURT: When is it that you are anticipating,
8 if all of the other items get worked out, that you will be
9 in a position to allow somebody to go into the room and
10 start looking at this source code?

11 MR. BIAL: A couple weeks.

12 THE COURT: A couple of weeks?

13 MR. BIAL: Well, here's the thing, Your Honor --

14 THE COURT: You've had these requests for how long
15 now?

16 MR. BIAL: Yeah, no. And it's really not that
17 part of it; it's really Sections 2 and 3 of the protocol.
18 They have to provide names to us, and then we have to vet
19 those names.

20 THE COURT: You may not have understood my
21 question.

22 Assuming all -- and I want to know on the Google
23 side, when has that -- when will you be prepared to have all
24 the source code that you have agreed to produce available to
25 be reviewed?

1 MR. BIAL: Within a week.

2 THE COURT: Okay. All right. So, that, I see as
3 being acceptable. You know, the idea that it's going to be
4 weeks or months --

5 MR. BIAL: No, I didn't intend to --

6 THE COURT: You know, we've got a process, we've
7 got a procedure, we've got to work through things, we're
8 preparing. You know, I -- we don't have enough time in this
9 case to not be doing what you have agreed to do. You know,
10 if we talk about a timetable for things that I order you to
11 do that you agreed to do, it may be different than that.
12 But -- okay.

13 So assuming the other issues, you know, who's
14 going to look at it, get the room set up and those kinds of
15 things, you would be in a position to have their experts be
16 able to start the process of looking at this information
17 within around a week; is that accurate?

18 MR. BIAL: That's correct.

19 THE COURT: All right. So tell me what the
20 problem is with 10, 11 and 12.

21 MR. BIAL: Yeah. It's -- the question on 10, 11
22 and 12, I think is, it's not that -- I mean, these are
23 intelligent individuals that are trying to help identify
24 what we would be producing. And let me give an example. So
25 in the meet-and-confer that we had yesterday, Ms. Garcia

1 mentioned bidding, which -- for 10, 11 and 12. We went to
2 the client yesterday, and we're in a position to produce
3 that, if that's what they're actually intending to receive.
4 I think a meet-and-confer was probably the way to go, but we
5 are where we are.

6 But that -- once we understood it's, you know,
7 potentially bidding, then we were in a position to go and
8 start collecting that for production. But, again, that is a
9 question about is that all they want, or are there other
10 things they want, and we don't know.

11 THE COURT: Okay. In these meet-and-confer
12 sessions, is it just the lawyers, or are technical people
13 involved? And I don't mean that lawyers can't also have
14 technical skills and capabilities, but I'm talking about
15 in-house technical people involved in the discussions to try
16 and have a fair exchange of information as to what we need
17 and how can you get it together.

18 MR. BIAL: These have been counsel.

19 THE COURT: Okay. Have you all explored the
20 possibility of having the people who really understand
21 things completely -- without things being lost in
22 translation to some extent -- having a discussion with
23 counsel to try and flesh some of these issues out?

24 MR. BIAL: No, we have not yet done that. I think
25 we would be open to doing that. I think to the extent that

1 they have more information or can give us more color, then
2 we could find the right individual. But I think we could
3 probably do that in a very short order as well.

4 THE COURT: Well, I assume, not only before this
5 motion got filed, but certainly after this motion got filed,
6 there have been some efforts to try and figure out what
7 could be captured in 10, 11 and 12 that isn't already
8 captured in 1 through 9.

9 MR. BIAL: Right. And I think if you look at some
10 of what's cited in the reply brief to the complaint, it
11 does, for some of those, when we're talking about 10, 11 and
12 12, cite back to precisely the ones that you mentioned
13 earlier, Bernanke, Poirot. So there is some of that in 10,
14 11 and 12. But I don't believe -- my understanding of the
15 government's position is that they're not limiting it to
16 that kind of thing. I think, you know, again, bidding was
17 mentioned, so that's the one that's on the table right now,
18 and we've gotten that one cleared.

19 THE COURT: Well, bidding is mentioned in 11 and
20 12. It seems to be the primary focus of 12. It says: "Any
21 automated means or manner of bidding, whether on individual
22 bids or on a campaign-level basis." So that seems to be
23 bidding.

24 Eleven is: "Bid, price floor or auction
25 optimization algorithm, product or feature." So 11 seems to

1 be -- I don't know whether price floor or auction
2 optimization is part of bid or not. But 10 just talks about
3 relating to products that determine which exchanges are. So
4 that isn't -- is that -- how does that relate to bidding?

5 MR. BIAL: Well, I don't know that it does. I
6 mean, we had a conversation yesterday about those three, and
7 that was the one thing that was identified. And it was a
8 discussion of the three as a whole rather than going one by
9 one.

10 THE COURT: Okay.

11 MR. BIAL: And I should just mention --

12 THE COURT: Where are you on --

13 MR. BIAL: I didn't mean to interrupt.

14 THE COURT: Go ahead.

15 MR. BIAL: It's never been the case that we don't
16 want to provide the information; it's really more of having
17 the back-and-forth, which we were having until -- or we
18 continue to have it, actually, after the motion to compel
19 was filed. And I think that's what we were trying to
20 accomplish. And I thought yesterday was a very productive
21 step at that because we now heard bidding was of interest,
22 and we were able to actually go with something specific like
23 you see in 1 through 9.

24 THE COURT: Well, it's a little hard to understand
25 how bidding just came to light as something of interest when

1 you look at 10 -- or certainly 11 and 12 that you've had in
2 your possession for a couple of months now; right? That
3 they were interested in bidding information. But that
4 obviously seems to be something that is more focused at this
5 point.

6 What about the guidebooks, dictionaries, that kind
7 of information? Where are you on that issue?

8 MR. BIAL: Yes. So let me answer that in two
9 ways.

10 First, we have a set of search terms. I mean, I
11 didn't -- we didn't attach it to our complaint. It's
12 20 pages and smaller than single-spaced. It's probably
13 Size 8 font.

14 THE COURT: I probably wouldn't understand them
15 either.

16 MR. BIAL: So it's pretty comprehensive.

17 We have that, and so they can run that. So I
18 would think that those would hit on these manuals. So
19 that's Number 1.

20 I think Number 2 -- and Your Honor put your finger
21 on this. For better or for worse, I do antitrust; that's
22 all I do. So when I'm working with an expert, I'm seeing
23 their models, their code. I've never heard them ask for a
24 how-to guide. I mean, they're the experts.

25 So, you know, I think they could be -- they have

1 that skill set. And I think Your Honor said in the
2 March 26th hearing that experts can be working before they
3 get the information. So presumably they can do that.

4 THE COURT: Yeah. But that, to some extent,
5 counters your argument, that if an expert has some roadmap
6 as to what this source code is intended to do or doing, when
7 they get into the, you know, safe space room or whatever it
8 is that they are limited in access and having information,
9 they have a base of knowledge to start work on and they're
10 not going in cold.

11 So there is some substance behind the request of,
12 you know, help me understand -- give me a primer on what I'm
13 going to be going in and looking at when I go in and start
14 seeing -- I assume it's not a small set of information in
15 the source code documents. I don't know how large it is.
16 But it's something that, you know, an expert probably would
17 want to have some general familiarity with what the process
18 is or what terminology is being used or those kinds of
19 things.

20 Why wouldn't that be of help to them and of need
21 to them?

22 MR. BIAL: Well, I think it could be. And I'm not
23 denying that a guidebook before you -- you know, you go into
24 the secure room wouldn't be helpful to get you up to speed
25 in advance.

1 We were asked that question, and we did run it to
2 ground, and it was not this kind of guidebook. I mean, I
3 guess there's -- I don't think they're talking about a basic
4 guidebook; I think they're talking about something more
5 complex than that to go into that room and be looking at the
6 code in a short amount of time.

7 For that exercise, at least in the back-and-forth
8 that we had, which was not insignificant, we were not able
9 to locate those. Again, I would point back to the search
10 terms, which I think -- if that doesn't turn something up, I
11 think it probably really doesn't exist. But at least for
12 the purposes of our collection and talking to the various
13 individuals who we thought would have knowledge of that, we
14 did not come across such a how-to guide.

15 THE COURT: Okay. Well, give me your
16 understanding of where the parties are based on the
17 conversation that you had yesterday.

18 MR. BIAL: Sure. I think in terms of the overall
19 motion to compel, clearly we've resolved the successor
20 custodians. And had we not done that this morning, I was
21 going to tell you exactly that I thought we did and we
22 would. So that was always going to be taken care of
23 irrespective of the fact that we got it done this morning.

24 With respect to the source code, I think 1 through
25 9, I think we can also agree that those are -- you know,

1 those are behind us. I think those are a meeting of the
2 minds on those nine.

3 And 10 through 12, as I mentioned earlier, I
4 think, you know, additional discussions between the parties
5 on a short leash -- because I understand from what you said
6 earlier, we don't have time for that -- would probably make
7 the most sense. And I think if that meet-and-confer is not
8 successful, that you'll hear from the government in very
9 short order.

10 THE COURT: Okay. What about in -- you know,
11 you're talking I think more directly about 39, but the other
12 requests that are part of the guidebook dictionary --

13 MR. BIAL: Right. The materials.

14 THE COURT: -- and the materials.

15 MR. BIAL: Right. Right.

16 Again, same thing. I mean, originally I think the
17 search terms were more geared toward that, but I think
18 obviously if they collect that material, then the
19 guidebooks, it would be helpful to them. And, as you
20 pointed out, if they had something like that, it's helpful;
21 it's not unhelpful. That process would turn that up.

22 THE COURT: Well, explain to me why it would be
23 difficult for Google to find out whether there are -- and
24 absent -- putting search terms aside and, you know,
25 automatic -- you know, one would -- again, I don't know

1 Google, don't know how complicated all of this is, but it
2 doesn't seem that difficult to find somebody at Google that
3 would know whether they have such things as dictionaries or
4 guidebooks or other kinds of information that one would, you
5 know, want to -- even if they don't get hit on search terms,
6 would be in a position to produce if they're there and
7 exist.

8 MR. BIAL: Right. Well, let me give you an
9 example. So pseudocode -- they asked for pseudocode central
10 repository, and if that existed -- I mean, we absolutely
11 went to the client, and they were not aware of such a thing.

12 And so I think, you know, the best answer to that
13 is really going to those search terms. And if something
14 were to turn up and we found out about it, we didn't know
15 about it -- I think they're obviously doing good-faith
16 searches -- we would turn it over immediately. They've made
17 it clear that they want that sort of information. If we
18 came across it, we would turn it over immediately.

19 THE COURT: Well, the problem you face -- and,
20 again, I'm giving you a scenario that I hope would never
21 happen -- is that you don't produce that kind of
22 information, and that in the middle of a deposition,
23 somebody talks about a dictionary, glossary or cultural
24 guide that is well known within the Google team and the
25 plaintiffs look at each other and say, did we get that? And

1 they say, no. I mean, that's why I'm asking you. Again,
2 this is to make sure that you don't get yourself in
3 trouble --

4 MR. BIAL: Correct.

5 THE COURT: -- is not just relying on these, you
6 know, pages of search terms, but on some specific
7 information, going out and making an individualized inquiry
8 about does that kind of information exist, and, if so, where
9 is it.

10 MR. BIAL: Right. Understood.

11 I mean, again, we would know as well once we do
12 those searches and before the depositions begin. And if
13 something turns up, they would get it. But I think you've
14 made very clear that that's something that is expected and
15 that would be something ordinarily pursued in discovery.

16 THE COURT: Okay. All right. Well, let me just
17 hear a little bit more from government counsel.

18 MR. BIAL: Thank you, Your Honor.

19 THE COURT: Thank you.

20 Was the meet-and-confer yesterday in person or
21 over the phone or Zoom or how was that done?

22 MS. GARCIA: Yesterday's meet-and-confer was on
23 Microsoft Teams, Your Honor.

24 THE COURT: Okay.

25 MS. GARCIA: It was the, I want to say ninth

1 meet-and-confer we have had since the outset of our
2 litigation since we were -- since we received Google's
3 objections to our RFPs, including our source code RFPs in
4 mid-April. That same week, we met and conferred with
5 counsel -- not counsel from this firm, but counsel from
6 another firm representing Google -- and began good-faith
7 discussions about how Google could go about responding to
8 this -- these requests.

9 During the course of that time, we had discussions
10 about how Google's concerns with respect to source code had
11 to do a lot with the fact that it was very highly sensitive,
12 and we proposed an alternative if it existed.

13 We asked that Google go back to its client -- this
14 was in early May -- and search for and ask if there was a
15 central repository for pseudocode. Our understanding is
16 that pseudocode is a plain-language explanation of source
17 code.

18 We proposed that if Google could do this within a
19 reasonable time and get our experts that material within a
20 reasonable time -- which we would have discussed had they
21 discovered a central repository -- we would take only two
22 weeks with that source code and come back to them and say
23 whether or not there is more information that we need or
24 whether or not what they've provided should suffice. After
25 three weeks, we were told there was no central repository

1 for pseudocode.

2 We continued to have good-faith discussions.
3 Yesterday's discussion with Mr. Bial was the first that he
4 had joined, but it was not the first time that we have
5 discussed this. We told counsel that -- going back to an
6 earlier point, we told counsel that we would be prepared --
7 if they told us that they were prepared to have our experts
8 come in and examine the source code, that same day we would
9 get them a list of names of individuals who could come in as
10 soon as possible.

11 We would welcome the opportunity to speak with
12 their data scientists about these issues. We haven't heard
13 anything from counsel about that opportunity. But to the
14 extent they're willing to have data scientists -- and I say
15 "scientists" because I strongly believe that there's not
16 going to be one person at the company who has this
17 information.

18 THE COURT: Right.

19 MS. GARCIA: But if they're willing to have prompt
20 discussions with those individuals, we would welcome that
21 opportunity.

22 The first time that they told us that there wasn't
23 clarity with respect to 10 -- Numbers 10 through 12 was
24 May 26th in a letter that was --

25 THE COURT: What did the objections to those

1 requests say?

2 MS. GARCIA: Well, the objections, I'll say
3 without looking, did describe -- object that they are vague.

4 THE COURT: I don't have the objections in front
5 of me, but I suspect I know that they would talk about being
6 vague or indefinite --

7 MS. GARCIA: Yes, they're --

8 THE COURT: -- or whatever; so ...

9 MS. GARCIA: Pardon me, Your Honor. Yes.

10 THE COURT: So, I mean, obviously you were put on
11 notice within 15 days after you served it that that was a
12 potential issue relating to what you had served.

13 MS. GARCIA: That's fair, Your Honor.

14 What we've tried to do is get to the heart of --
15 to the extent that these vagueness objections were
16 objections made to every single RFP that we posed, what it
17 is that we can do in order to come to a meeting of the minds
18 as to what these terms mean. And we've made good efforts
19 with respect to several other RFPs.

20 THE COURT: All right.

21 MS. GARCIA: We haven't received a single document
22 from anyone's custodial files responsive to any search terms
23 to date. This information about manuals and data
24 dictionaries and other important information that our
25 experts need in order to have sufficient context to read the

1 code may not be in custodial files. It may be, but it may
2 not be.

3 One concern that we raised yesterday was that we
4 do not know when we will receive a production from Google of
5 any documents that hit on any of the search terms in the
6 exhibit that Mr. Bial brought today. So we can't tell you
7 one way or the other whether or not the search terms are
8 going to be sufficient.

9 We suspect that, given the tight timeline that our
10 experts will be facing and the very strict rules in which
11 they have to oblige in order to review the code, that
12 they'll want this information more quickly than we would
13 be -- otherwise be able to get if we waited for a production
14 from Google responsive to search terms.

15 With respect to the central repository, that was
16 part of our attempt to reach resolution and have a
17 compromise that perhaps would have worked for Google. It's
18 unfortunate that there is no central repository, but we
19 don't mean to suggest that that should be the end of the
20 inquiry. I think there are other good-faith steps that
21 Google can and should take in order to identify any manuals
22 or documents, which may not be one specific manual but may
23 be a series of manuals or may be a series of dictionaries,
24 or, you know, a compendium of information that other -- that
25 others at Google have access to but that we just don't know

1 whether or not it exists.

2 We hope that the search terms we've agreed to in
3 good faith with Google will be an effective and efficient
4 way to obtain the information we need, but we don't
5 understand why it is burdensome for Google to ask its own
6 people whether or not this information exists and run that
7 to ground. So we have concerns about timing.

8 THE COURT: And we all have concerns about timing.
9 I mean, I think we all know the schedule that Judge Brinkema
10 has set for us, and we all have to work within that
11 schedule. And I'm sympathetic to both sides in this case.
12 And I mean that. You have a lot on your plate getting ready
13 to present a very large case against a very large company,
14 and a very large company has a lot at stake in defending
15 this case. But it's got to be done fairly and efficiently.
16 And, you know, honestly, you all have worked together really
17 very well to date. And I want to express my personal and
18 the Court's appreciation for you all continuing to work
19 together. I mean, I know I've got requests for a joint
20 order yesterday that I need to look at before I enter it.
21 But, you know, those are the kinds of things that the
22 parties should be doing. It's in the interests of the
23 United States to do that; it's in the interests of Google to
24 do that, and I want to encourage you all to continue to do
25 that.

1 This one, while I think very substantive
2 meet-and-confers -- sometimes the numbers don't mean much;
3 it's more of how the substance is going. You know, the
4 substance of the meet-and-confer sounds like it started late
5 last week and continued into this week, I mean, the real
6 back-and-forth on exchanging some information.

7 You know, I've expressed to you all some concerns
8 that I had on what was presented to me in the pleadings
9 themselves as to not having a clear understanding of
10 what's -- what you're moving to have them do that they
11 haven't already agreed to produce, and I think you've
12 provided me with some explanation as to that. I think I've
13 explained why, you know, that kind of information is
14 important and needs to be produced. Whether it is word for
15 word what you have asked for in your document requests or
16 not, I'm still uncomfortable with saying.

17 My suggestion with having more technical people
18 involved in the discussion -- and, again, this is just -- I
19 have done it in the past and have seen it to be successful;
20 I've done it in the past and it hasn't been successful. I
21 just want you to think about it and consider whether that is
22 a way that -- you know, sometimes technical people
23 understand what technical people need more than lawyers
24 hearing from a technical person as to what he or she needs
25 and then passing that information along and back and forth.

1 I'm going to defer ruling on this issue today.
2 I'm going to give you two options, and you all can talk
3 about which of the two options you want and how we go
4 forward.

5 Option 1 is that we have another hearing next
6 Friday on this issue and that you all report to me by the
7 end of the day on Wednesday of next week as to where we are,
8 and then I will decide it next Friday. One way or the
9 other, somebody's going to be happy, and somebody's going to
10 be sad.

11 The other issue -- and this would give you a
12 little bit more time -- is that I would hear -- and it's
13 unrelated but connected. It's probable that I am going to
14 move the hearing that's set for two weeks from today to the
15 day before, that is Thursday, at 2:00. There's some issues
16 with some conflicts and things like that. So -- and I think
17 that is a -- it would be specially set at 2:00 and will go
18 as long as we may need depending on the issues there. And I
19 think I'm going to get the opposition to that motion today.
20 I think I have that calendared right. So the reply would
21 come in at the end of next week.

22 So your two options are either decide whether you
23 want me to hear this next Friday at 10:00 or the following
24 week on Thursday at 2:00 in conjunction with the other
25 motion to compel that has already been noticed that I'm

1 going to be moving to Thursday at 2:00. And if there's a
2 problem with that Thursday at 2:00, let me know. I won't
3 enter the order until Monday. So if there's some issue as
4 to that, then maybe let me know by Monday which of the two
5 options you would rather pursue.

6 There are benefits to both, and that's why I'm not
7 picking one. I think the earlier, the better, but I'm
8 giving you the opportunity. And, again, if you're inclined
9 to have technical people involved in the discussions, you've
10 got to schedule it and do it. So next week may be pushing
11 it, but, again, we don't want to delay getting a decision so
12 that we can keep things on track.

13 Any questions at this point?

14 MS. GARCIA: No. Thank you, Your Honor.

15 THE COURT: Anything else from the government?

16 MS. TARVER WOOD: Thank you, Your Honor. We
17 appreciate it.

18 THE COURT: Anything else from Google?

19 MR. BIAL: No, Your Honor.

20 THE COURT: Okay. Well, thank you all very much.
21 I appreciate it. You all have a nice weekend. Court will
22 be adjourned.

23 (Proceedings adjourned at 11:53 a.m.)

24 -----

25 I certify that the foregoing is a true and accurate

1 transcription of my stenographic notes.

2 Stephanie Austin

3 Stephanie M. Austin, RPR, CRR

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